UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 179,

and **Cases 13–CC–262182**
13–CE–262185

CRUSH CRETE, INC.

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DECISION

INTRODUCTION

DAVID I. GOLDMAN, ADMINISTRATIVE LAW JUDGE. The government alleges that a union violated Section 8(b)(4)(ii)(B) of the National Labor Relations Act (Act) by, during a phone call from its agent to an aggregate supplier's president, threatening to shut down the supplier and the jobsite to which the aggregate was being supplied. The union representative denies making any threat during the phone call and, therefore, the union denies any violation of 8(b)(4)(ii)(B).

In addition, the government alleges that a provision in the union's multi-employer collective-bargaining agreement is facially violative of Section 8(e) of the Act and that by becoming a signatory to it the union independently violated 8(e). The provision in question requires that nonsignatory haulers delivering certain base road materials to the construction site must deliver to stockpiles. As to this allegation, the union disputes that the provision establishes a facial violation of the Act as alleged by the government.

I dismiss both of the government's allegations. The 8(b)(4)-related facts are over-complicated by evidence of a union picket, bannering, and rat display, deployed by the union in pursuit of its objectives, but none of which is alleged by the government to be unlawful. At bottom, the case rests on a thin reed: whether in a 7 minute phone call between the union representative and the supplier's president—as to which the parties do not even agree on when it occurred—the union threatened to shut down the supplier and general contractor. Neither participant in the phone call—the only witnesses to it—gave a convincing account. The

unconvincing nature of the witnesses' testimony leaves me—unconvinced. There is no corroboration for the threat—no notes, no one contemporaneously told about the threat, nothing. Indeed, a letter sent to the union from the employer's attorney the day after summarizing events and accusing the union of unlawful conduct with regard to the picket, bannering, and rat, does not mention the phone call or any threat therein. As discussed herein, on these facts, I do not conclude that the threat occurred. Indeed, in my estimation, the disputed phone call had little contemporaneous import to events. As the supplier's president ultimately admitted during cross-examination, he was outraged by the rat and banner because he believed that after the phone call the dispute over the delivery trucks was over. He described the phone call as just "business as usual" and the offending trucks were replaced by the general contractor as repeatedly had been done in the past when the union complained about a hauling company. Given this, he could not understand why the union showed up with a rat and banner the next day. He may or may not be warranted in his anger about that, but the 8(b)(4) allegation must be dismissed. Even assuming (without deciding) that one object of the union's agitation was to have the supplier and general contractor to cease doing business with the nonsignatory hauler or to enforce an unlawful contract provision, it remains unproven that the means deployed toward this end were unlawful. As noted, the picketing, bannering, and inflatable rat, are not alleged to be improper means. They were the original subject of the charge and, I am sure, the conduct that animated it. But without a "threat" in the phone call, there is no 8(b)(4)(ii)(B) violation alleged or proven.

As to the Section 8(e) claim, the government contends that the contractual clause at issue violates Section 8(e) on its face—in "per se" fashion—because it requires that nonsignatory haulers deliver base road materials to stockpiles. I disagree. Indeed, in controlling precedent, the Board has rejected the government's claim. In addition, other elements necessary to prove an 8(e) violation are unproven and unaddressed by the government. Accordingly, as discussed at length herein, the Section 8(e) allegation must be dismissed.

STATEMENT OF THE CASE

On June 26, 2020, Crush Crete, Inc. (Crush Crete) filed unfair labor practice charges alleging violations of the Act by the International Brotherhood of Teamsters, Local 179 (Union or Local 179 or Respondent), docketed by Region 13 of the National Labor Relations Board (Board) as Cases 13–CC–262182 and 13–CE–262185. Crush Crete filed first amended charges in each case on November 30, 2020.

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Based on an investigation into these cases, on January 11, 2021, the Board's General Counsel, by the Regional Director for Region 13 of the Board, issued an order consolidating the cases, and a consolidated complaint and notice of hearing. The Acting Regional Director issued an amendment to the consolidated complaint on February 21, 2021. Local 179 filed an answer to the amended consolidated complaint on February 22, 2021, denying all alleged violations. The Acting Regional Director issued a first amended consolidated complaint on March 10, 2021, and a second amended consolidated complaint on March 16, 2021. On March 23, 2021, Local 179 filed an answer to second amended consolidated complaint denying all violations of the Act.

The hearing was conducted on May 10 and 11, 2021. Counsel for the Acting General Counsel (herein the General Counsel), the Respondent, and the Charging Party, filed briefs in support of their positions on or before June 29, 2021.

On the entire record, I make the following findings, conclusions of law, and recommendations.[1]

JURISDICTION

At all material times, Crush Crete has been a corporation with an office and place of business in Addison, Illinois, and has been engaged in the recycling of concrete and asphalt and production of roadway material. In conducting its operations during the 12-month period ending December 31, 2020, Crush Crete provided services valued in excess of $50,000 for R.W. Dunteman, an Illinois contractor in the construction industry directly engaged in interstate commerce. At all material times, Crush Crete has been an employer engaged in commerce within the meaning of Section 2(2), and (6), of the Act. Based on the foregoing, I find that this dispute affects commerce within the meaning of 2(7) of the Act and that the Board has jurisdiction of this case, pursuant to Section 10(a) of the Act.

UNFAIR LABOR PRACTICES

Findings of Fact

Background

R.W. Dunteman, the Teamsters, and the MARBA Agreement

R.W. Dunteman is a construction contractor with its principal office in Addison, Illinois, where it operates an asphalt plant.[2]

R.W. Dunteman operates throughout the northern half of Illinois. R.W. Dunteman is engaged in a multi-year road construction project to expand a section of N. Weber Road, extending south of Interstate 55 for about four miles, in and near Romeoville, Illinois. Another general contractor, Judlau, is responsible for the portion of the same project extending north of I-55 for approximately three miles.

R.W. Dunteman is a signatory to a collective-bargaining agreement between the Mid-America Regional Bargaining Association (MARBA) and Teamsters Joint Council No. 25. (Hereinafter, the MARBA agreement.) This agreement, the most recent version of which is effective from June 1, 2019 to May 31, 2023, governs the terms and conditions of employment for a wide variety of heavy-highway and related work performed by signatory employers such as R.W. Dunteman, including the Weber Road project. R.W. Dunteman employs over 100 employees on a seasonal basis, including approximately 25 truckdrivers. R.W. Dunteman's

[1] On my own motion, I correct the following errors in the transcript: Tr. 8, line 6, replace "president" with "precedent"; Tr. 45, line 25, replace "windrow" with "window"; Tr. 88, line 19, replace "1779" with "179"; Tr. 101, line 20, replace "up" with "off"; Tr. 126, line 24, replace "dumb" with "dump"; Tr. 172, line 24, replace "off of" with "offer"; Tr. 439, line 22, replace "standing" with "sending"; Tr. 476, line 11, add "to" after "Next"; all references to "Jude Law" are replaced with "Judlau".

[2] R.W. Dunteman is owned by the Dunteman brothers. Jeff Dunteman is the vice president for operations. Matthew Dunteman is secretary/treasurer of Dunteman and in charge of the Addison Asphalt plant. Roland Dunteman is the president. There may be a fourth brother, but he is not identified for the record.

truck drivers on the Weber Road project are represented by Teamsters Local 673, which is party to the MARBA agreement. These drivers operate trucks for R.W. Dunteman on the construction site, for instance, moving gravel and materials between stockpiles and the roadbed. Local 673 generally represents Teamsters from contractors domiciled in DuPage County and the southern part of Kane County. This includes R.W. Dunteman, which is headquartered in Addison, within DuPage County.

The Respondent in this case, Teamsters Local 179, maintains jurisdiction in counties south of DuPage, including Will County, where the Weber road project is located. It is a general local representing a "mixed bag" of industries but its construction division, headed by Secretary/Treasurer Greg Elsbree, represents employees in the construction and heavy highway industry. Local 179 is party to the MARBA agreement.

The MARBA agreement contains extensive subcontracting provisions and restrictions, set forth in Article 3 of the agreement.

Article 3.1(a) restricts subcontracting of onsite construction or roadwork to an employer who is "party to an appropriate, current labor agreement with the appropriate Union, or subordinate body signatory to this Agreement." Article 3.1(a) states in full:

> The Employer agrees that neither he/she nor any of his/her subcontractors on the job site will subcontract any work to be done at the site of construction, alteration, painting or repair of a building structure, road or any other work (including quarries, rock, sand and gravel plants, asphalt plants, readymix concrete plants, established on or adjacent to the job site to process or supply materials for the convenience of the Contractor for job site use) except to a person, firm or corporation, party to an appropriate, current labor agreement with the appropriate Union, or subordinate body signatory to this Agreement.

Article 3.1(b) recites the employer's agreement that materials, such as aggregate on roadbed "will be spread or distributed" including on roadbeds, "exclusively by employees covered by this Agreement." Article 3.1(b) goes on to provide—and this is the portion of the clause that the General Counsel objects to as violative of Section 8(e)—that "[d]eliveries of stone, stabilized base materials, sand and gravel by employees . . . or entities not covered by this Agreement shall be made exclusively to stock piles." Article 3.1(b) states in full:

> The Employer agrees that stone, stabilized base materials, sand and gravel will be spread or distributed on a construction site including road beds, exclusively by employees covered by this Agreement. Deliveries of stone, stabilized base materials, sand and gravel by employees, firms or entities not covered by this Agreement shall be made exclusively to stock piles and the Employer ordering those materials for delivery by a third party is responsible to see that the provisions of this Section are not violated provided that the Union shall hold the Employer harmless for suits or demands under this Section not in accord with federal law.

Article 3.2 is an "area standards" clause, in which the employer agrees "that when subcontracting work covered by this Agreement . . . which is not be performed at the site . . . the work will be subcontracted only to an employer that agrees that "the persons performing such work . . . will receive not less than the wages and economic benefits provided in this agreement." Article 3.2(a) states in full:

> In order to protect the wages, working conditions and job opportunities of workers employed under this Agreement, the Employer agrees that when subcontracting work covered by this Agreement which is to be performed within the geographical area covered by this Agreement, but which is not to be performed at the site of the construction, alteration, painting or repair of the building, road or other work, he/she will subcontract such work only to an Employer or person who agrees that the persons performing such work will work in accordance with the schedule of hours and will receive not less than the wages and economic benefits provided in this agreement including holidays, vacations, premiums, overtime, health and welfare and pension contributions, or benefits of their equivalent and any other programs or contributions required by this Agreement, and who further agrees to submit any grievance or disputes concerning his/her performance or compliance with such undertaking to the procedures set forth in Article 6 [Grievances and Arbitration] of this Agreement.

Crush Crete

The Charging Party Crush Crete is an employer that recycles road material into a usable aggregate for resale to construction sites. Crush Crete operates out of R.W. Dunteman's Addison facility property. There is some—maybe a lot of—common ownership with R.W. Dunteman. For instance, Jeff Dunteman is Crush Crete's president and an owner. However, Jeff Dunteman emphasized in his testimony that "Crush Crete is a separate operation and we run it separately."

Crush Crete employs approximately eight employees working as operators. They are represented by the Operating Engineers Union, Local 150. Crush Crete does not employ drivers to transport road material and aggregate to and from customers. Rather, it subcontracts to "hauler" trucking companies to make these deliveries and pickups.

In June 2020 R.W. Dunteman contracted to purchase crushed asphalt or "capping aggregate" from Crush Crete for use in the Weber road project. Capping aggregate, also known as RAP, is the final product that goes on the roadbed before the pavement is poured. Crush Crete contracted the delivery of its capping aggregate to R.W. Dunteman to a nonunion trucking company, Global Transportation and Excavating (Global).

June 18—The Union discovers that Global is delivering Crush Crete's aggregate to R.W. Dunteman's Weber Road construction site

Local 179 representatives regularly visit construction sites within the Local's jurisdiction and observe for contract compliance. On a big project, such as the Weber Road project, there can be daily site visits by Local 179 representatives. James Babcock is the Local 179 business agent whose service area includes the Weber Road site. He testified that he has been to the Weber Road location to observe a couple of hundred times. He typically will report his findings to Local 179's construction division head (and Local Secretary/Treasurer) Greg Elsbree.

Elsbree testified that, among other things, the Local monitors construction sites for compliance with the "area standards" subcontracting provision of MARBA, Article 3.2. Typically, the union representative will try to interview trucking subcontractors making deliveries to the construction sites to determine whether the employees are being paid "substandard" wages and benefits. If the representative discovers a potential violation of Article 3.2, he or she typically approaches the foreman or supervisor on the job to alert them of what the Local has found. In

many cases this is sufficient to correct the problem and the foreman replaces the "substandard" trucks with a contractor paying appropriate wages and benefits.

Elsbree testified that if the matter is not resolved informally, the Union might "throw up" an area standards picket. If that does not resolve the matter, Elsbree testified that he would send a "noncompliance" letter informing the employer that it is violating Article III of the MARBA agreement by not paying a delivery subcontractor area standards and then invoke the grievance procedure. Elsbree estimated that the Local sends out about two-dozen "noncompliance" letters over the course of a summer construction season, or about two a week.

On or around June 18, 2020, Elsbree made a site visit to R.W. Dunteman's Weber Road project. He was covering that day for Babcock, the Local 179 business agent who regularly covers the Weber Road work site, but who was busy on other work that day. While Elsbree was there he saw Global trucks delivering aggregate, in this case directly to the roadbed.

Elsbree attempted to interview two of the Global drivers. One gave him minimal information indicating he earned about $28 an hour, well below the "area standards" rate. The other would not speak to him. Elsbree had never heard of Global and asked one of the Dunteman employees on the site where the drivers were from. Elsbree was told that they are from a company "up north" from Addison, Illinois. Elsbree followed the trucks when they left in hopes of finding out where they were getting their loads from.

On the way, Elsbree contacted Local 673 representative, Rick Whitcomb. Local 673 represented R.W. Dunteman, and Elsbree knew that Local 673's jurisdiction included Addison. Elsbree asked Whitcomb if he knew anything about the Global trucks. Whitcomb told Elsbree that he was familiar with Global and that R.W. Dunteman used them for road jobs in the area. Whitcomb also told Elsbree that he thought that Global were "the house trucks for Crush Crete."

Whitcomb confirmed Elsbree's opinion that Global was "not up to our area standards, wages and benefits for heavy highway work." Whitcomb testified that he had come across Global trucks a few months before on a Dunteman site and had interviewed them and concluded they were not paid area standards. Elsbree asked Whitcomb if he could "reach out to the Dunteman company" to see what could be done about Global delivering to the Weber Road roadbed. Whitcomb told Elsbree that he was "heading that way anyway and that he would talk to Matt Dunteman." Whitcomb testified that it was not unusual for him to speak to a company he serviced on behalf of another local union in an effort to resolve a problem.

Whitcomb testified that upon Elsbree's request he went to the R.W. Dunteman asphalt plant in Addison and spoke to Matt Dunteman about the Global trucks. He testified that he told Dunteman that had received a call from Local 179, and told him, "[y]ou got some trucks running down there [at Weber Road] that are substandard and 179 is very good about policing their area." Whitcomb told Dunteman that Local 179 "are going to be watching what you are doing down there and it's probably best that you take care of the situation . . . so there is not any type of job action or anything like that, . . . or any issues down there." Matt Dunteman confirmed that the Global trucks were working for Crush Crete and Matt Dunteman offered to call Crush Crete, which he did as Whitcomb stood by and listened to Matt Dunteman's end of the conversation. Matt Dunteman explained the situation, and that he was "down here with the BA [business agent]." Matt Dunteman said on the call, "do you think we could fix the situation . . . and have

the good trucks out there." The call seemed to go smoothly. When Dunteman hung up he told Whitcomb, "all right. It's taken care of."[3]

Whitcomb then contacted Elsbree. He told Elsbree that he had spoken to Matt Dunteman, that Dunteman had called over to Crush Crete, and that Matt Dunteman had told Whitcomb that everything will be fine "from here going forward." However, in reporting this to Elsbree, Whitcomb added a final note of skepticism, saying, "we'll see about that." Whitcomb testified that in the past with R.W. Dunteman, and other employers too, promises were made to take care of issues raised and sometimes they were but other times they were not. However, Elsbree also testified that the Local had "a good relationship" with R.W. Dunteman and that they readily "swapped out" contractors when the Union raised an issue.

June 23—The Union reacts when it finds that the Global trucks have returned to the Weber Road job site

The morning of June 23, Local 179 Business Agents James Babcock and Tony Seminary came to the Weber Road job site to observe as part of their routine policing of heavy highway sites within the Local's jurisdiction. Seminary was the "new guy," just "learning the ropes" of union representation in the construction industry. He was "following Jim [Babcock], doing what I was told." Babcock was more experienced and essentially in charge.

Babcock suggested that he had few problems with R.W. Dunteman and its project manager and superintendent at the Weber Road site, Emsi Oshana. For his part, Oshana testified that he had a "pretty good relationship" with Local 179 and knew Babcock, whom he saw at the site "off and on" on a regular basis. Babcock testified that on approximately five previous occasions he had told Oshana that certain subcontractor "trucks were no good," and Oshana would "generally remove them and replace them with different trucks." Oshana agreed that he generally would remove a subcontractor from the job site when the Union asked him to do so.[4]

When Seminary and Babcock arrived at the Weber Road jobsite, at about 8:45 AM, they immediately saw a Global truck on the site unloading. Babcock had spoken to Elsbree the day before and Elsbree had told him that the Global trucks were "below our area standards and they were also nonsignatory." In this regard, Babcock agreed that from the union's viewpoint, there were two problems with the Global trucks: they did not meet area standards, and also they were nonunion.

Seminary and Babcock parked their cars in the parking lot of a restaurant ("Stella's Bar & Grill) about 300 feet west of the intersection of N. Weber Road and W. 135th Street (also called W. Romeo Road).[5] The Global trucks were unloading on the roadbed of the part of W.

[3]Matt Dunteman did not testify. I credit Whitcomb's unrebutted account of the interaction he had with Matt Dunteman.

[4]However, Oshana characterized things differently in his testimony. According to Oshana, the Union, and specifically Babcock would tell him that the contractor was "non-Union. They are off the job." Oshana denied that Babcock would refer to the trucks as "no good" or "substandard," but rather, as being nonunion.

[5]A Google map of the area was introduced as Charging Party Exhibit 2.

135th Street that continues just west of the intersection of N. Weber and W. 135th Street.[6] Stella's restaurant was about 200 feet further west of where the Global trucks were unloading.

Babcock attempted, unsuccessfully, to speak with the Global driver. The driver would not speak with him. After the first Global truckdriver would not talk to Babcock, Babcock gave Seminary the "thumbs up" which Seminary knew meant for him to grab the picket sign he carried in his car trunk and stand with the sign. He handwrote "Global Transportation" onto the sign—the sign had an erasable spot to write in the name of the company being protested—and stood with the sign in a grassy area on the north side of the W. 135th Street "side road" where the Global trucks were unloading. He stood there with his sign whenever a Global truck was onsite. The sign stated:

Teamsters Local #179
ON
STRIKE
Against
Global Transportation
No Signed Contract

Seminary engaged in this picket intermittently from about 9 to 9:30 a.m. but only during that time when a Global truck was onsite to unload. When a Global truck unloaded and left the premises, Seminary put his sign down. When a Global truck returned, he would put the sign up. However, neither he nor Babcock took any physical steps to stop the trucks from unloading. Whenever a Global truck was onsite, Seminary stood in the grassy area on the north side of the roadbed and did not patrol or block access to the Global truck or anyone else. There was no disruption to the work based on his picket. Babcock tried unsuccessfully to talk to the Global truckdrivers when they came onsite to dump.

Seminary described seeing two more Global trucks (after the first one) during the approximately 30 minutes between 9 and 9:30 a.m. The trucks arrived, one at a time, dumped their loads on the roadbed just west of Weber Road and in front of a fire station. A laborer and an operator working on the site would spread the aggregate with a bulldozer. Neither Babcock nor Seminary saw a Global driver get out of the truck and do any work on the roadbed.

At about 9:30, Babcock told Seminary that, "we are not going to succeed here. We are not going to get anything done." Babcock testified that they ended the picket at that point because [i]t was ineffective." He testified that he had hoped that the picket would either "get [the Global drivers] to prove up that they were getting paid right" or if not he was "hoping that they wouldn't return to the job site." After 9:30 a.m., Seminary put his sign face down on his windshield and he and Babcock stayed there observing for the next couple of hours, and took some photographs of the site. Additional Global trucks arrived during the morning, but neither Babcock nor Seminary brought out the picket sign again. Around 10:35 a.m., another union representative, Jeff Brown arrived. He parked next to Seminary and Babcock in the Stella's parking lot, and remained with them observing.

[6] I am calling it W. 135th Street. Based on the record it is not clear that the road continues to be called W. 135th Street after one crosses west past the N. Weber Road/135th Street intersection. But if W. 135th continues west, that is the section of road where the dumping in question occurred that day, just west of N. Weber Road.

Oshana testified that the dumps that day on this side road were intended to create a new stockpile. Jeff Dunteman testified that on June 23, "we had to dump . . . into piles on the side roads." According to Oshana, "We were making a stockpile of it so that I could assess the situation and see" what machine and method he would use to then spread the material on the roadbed. However, it is also clear from testimony that whether intended as a stockpile or not, the loads were dumped on a part of the roadbed being worked on and the R.W. Dunteman employees then spread the dumped loads on that part of the roadbed.[7]

When queried on cross examination, Seminary testified that he did not use an "area standards" picket sign because he only had the one sign with him—the one that stated "No Signed Contract." Seminary claimed that at the time he was a new employee, learning the ropes, and this was the first time as a union representative that he had pulled out a picket sign, and did not know that the Union had other picket signs—such as an "area standards" picket sign—that he could have brought with him.

Babcock testified that he did not, at least initially, see the verbiage on the sign that Seminary was using, but did see it "[a]fter the fact." Babcock did not tell Seminary that he was using the wrong sign because, in fact, "the trucks were non-Union." Babcock testified that while usually they would use an area standards sign to protest a "substandard" hauler and a "no signed contract" sign for "somebody we would like to organize," he suggested that because Global was both a nonunion hauler and substandard, it would not be so unusual to use the "no signed contract" sign for an employer, such as Global, that was also substandard.

R.W. Dunteman and Crush Crete react to the Union presence; Union Representative Whitcomb contacts Matt Dunteman and then Jeff Dunteman

Oshana testified that on June 23, the first loads from Crush Crete started arriving with Global trucks between 7:30 and 8:00 a.m. Around 8:30 or so, according to Oshana, he received a call from a foreman/grade checker, Danny Ilia, telling him that Local 179 representatives were at the job site and interrogating the Global truckdrivers. Oshana instructed Ilia "to allow the Teamsters representatives to ask any questions of the drivers they wanted to, and that was the end of the conversation."[8]

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[7]It seems clear from the varying descriptions and accounts by witnesses that the parties do not agree on the meaning stockpiling. Although less than pellucid, the union witnesses gave the impression that dumping directly on the roadbed could not be considered stockpiling. Jeff Dunteman and Oshana clearly disagreed, and took the view that stockpiling could occur anywhere that the employer required material to be dropped, staged, or stored, including on the roadbed. Jeff Dunteman called it "stockpiling on the site."

[8]Oshana first testified that he was told by Ilia that the union representatives were holding up trucks, not letting them dump, and checking for union cards. Ilia did not testify. Oshana's account was objected to as hearsay and neither offered nor received (Tr. 118–119) for the truth of the matter asserted. Nevertheless, it is what he said he was told. On cross examination, Oshana admitted (as was stated in his pretrial affidavit in statements he adopted at trial) that he asked Ilia what Ilia meant by the union "holding up the trucks" and Ilia told him that "they are asking the drivers questions and if there is an issue, they'll be contacting me." Thus, Oshana's suggestion at trial that he was told that the Global truckers were not being allowed by the union to dump their loads was, at best, misleading.

Upon hearing Ilia's report, Oshana did not call Jeff Dunteman immediately, but testified that he called Dunteman "when I got around to it." He testified that he waited 10–15 minutes because he "had other activities that I was doing," and then Oshana contacted Jeff Dunteman so he could "find out what exactly is going on." Oshana called Jeff Dunteman between, he estimated, 8:30 and 9:00 a.m., and asked him, "what's going on with these trucks that you sent out here." Jeff Dunteman testified that Oshana told him "we can't send Global trucks down there because they were non-Union." Oshana testified that Dunteman was "pretty upset about it." Jeff Dunteman told Oshana that should not be happening, because the Global drivers "were dumping in a stockpile."[9]

Dunteman told Oshana to "get ahold of the dispatcher Romero, find out what the hell is going on out there." Oshana told Dunteman that he "doesn't want to have a problem with 179." Jeff Dunteman told Oshana that "[t]hat Crush Crete is going to deliver the material because he ordered 30 loads and we want to send 30 loads down there." Oshana testified that he hung up and called Romero. However, Oshana did not testify about what Romero told him and Romero did not testify.

Elsbree testified that he received calls that morning that from the Local 179 representatives telling him that the Global trucks had returned. Elsbree called Whitcomb, the Local 673 representative, at about 9 a.m. He told Whitcomb that contrary to their hopes after talking to Matt Dunteman, "the problem is not resolved," and the Global trucks were back.

Whitcomb called Matt Dunteman and told him that the Global trucks had returned to the Weber Road site. Matt Dunteman told him that "you're going to have to talk to Jeff [Dunteman]," telling Whitcomb that Crush Crete, [t]hat's Jeff's company." Whitcomb then called Jeff Dunteman. Whitcomb's account of the conversation is as follows:

> Jeff, I said Matt told me to give you a call. I said it's about the Global trucks that are running down there in 179's area. I said you know 179 patrols their stuff really tight down there. There is going to be an issue on the job site and Jeff said, well, I am not going to change what I am doing. You know, they are going to keep running down there and I said, oh, okay.

[9]Oshana testified that he told Jeff Dunteman that "the Teamsters are out here. They are carding the guys. They are not letting them dump and they are having them thrown off the job." This was Oshana's testimony about what he told Jeff Dunteman. It was not corroborated by Dunteman. Moreover, Oshana had no basis for the claim that the Union was not allowing Global to unload. As discussed in the preceding footnote, Oshana admitted that this had not been what he took from his conversation with Ilia. Had he believed that Local 179 was stopping the Global trucks from dumping, I do not believe he would have waited and called Jeff Dunteman "when I got around to it." But that was Oshana's testimony. Oshana proved through this and other such incidents to be an unreliable and tendentious witness. Indeed, for all his testimony about events with the union that morning, Oshana admitted that "I had no idea what was going on between 8:30 and 11:30."

> And then he said to me he says, you know, Rick, you know when you are a little kid and you do something wrong and your dad has got to give you a spanking before you do it right? I said yeah and he goes I need a spanking.[10]

After Whitcomb hung up with Jeff Dunteman he called Elsbree at about 10 a.m. (Tr. 377) and told him about his call with Dunteman, and reported that Dunteman "is not changing what he is doing." Whitcomb told Elsbree that he should contact Jeff Dunteman. He texted Jeff Dunteman's phone number and contact information to Elsbree.[11]

Elsbree then emailed a "non-compliance" letter to Roland Dunteman, the president of Dunteman. The letter, dated June 23, 2021, and introduced with an email showing it was sent at 10:27 a.m., was on Local 179 letterhead and stated as follows:

> **NOTICE OF NON-COMPLIANCE WITH ARTICLE 3**
>
> RW Dunteman Co
> Via Email: rdunteman@rwdco.com
>
> To Whom It Concerns:
>
> As provided in Article 3 of the Mid-America Regional Bargaining Association Area Wide Suburban Agreement, the following company is not in compliance with the requirement of Article 3 with respect to paying an amount equal to the wages and fringe benefits being paid to employees covered by this agreement:
>
> **Crushcrete Inc**
> **Global Transportation & Excavating LLC**
>
> You are requested to cease contracting with the above listed company immediately.

[10]Jeff Dunteman, who attended the entire hearing as the Charging Party's representative, testified as part of the General Counsel's case-in-chief and then again on rebuttal. He did not mention speaking with Whitcomb on June 23, even on rebuttal after hearing Whitcomb's testimony. However, in the recording and transcript of his June 24 confrontation with Whitcomb the next day (discussed below), Dunteman acknowledged speaking to Whitcomb on June 23, acknowledged the spanking metaphor, and claimed that he had committed to Whitcomb that he would stop sending the Global trucks to Weber Road. (See, R. Exhs. 9 & 10.) For all these reasons, I do believe Whitcomb talked to Jeff Dunteman the morning of June 23, and I credit Whitcomb's unrebutted testimonial account of their conversation.

[11]I note that on cross-examination, counsel's question to Whitcomb presumed that his conversation with Elsbree took place about 9 a.m. (Tr. 406), but that, in fact, was not Whitcomb's testimony. See, Tr. 377. In any event, although the matter is not free from doubt, Elsbree and Whitcomb's consistent testimony was that Whitcomb's phone call to Elsbree and his texting of Dunteman's contact information was not completed until about 10 a.m. (Tr. 377; 270). I credit that consistent testimony.

Back at Weber Road, Project Manager Oshana arrives and approaches the Union representatives

Elsbree arrived at the Weber Road site at about 11:15 a.m. He testified that a couple of trucks were dumping materials when he arrived. The three union representatives were standing by their cars and told him they were done, and that Dunteman's only needed a couple of more loads to be finished so they could finish the paving scheduled for the next few days.

Just after Elsbree arrived, the Dunteman project manager Emsi Oshana arrived on the scene, pulling up in his pickup truck and parking in the parking lot.

According to Seminary, Oshana was angry, but mostly about Jeff Dunteman's use of "these bull shit trucks out here." Seminary testified that Oshana arrived saying things to the effect of, "I told fucking Jeff Dunteman we have to have good trucks out here. They keep sending these bull shit trucks out here. He knows it's going to be a problem." Babcock testified that Oshana was "MF'ing Jeff Dunteman for F'ing up his job." Oshana asked, "what was going on," and Babcock told him that "the trucks are no good" or "the trucks were bad." Oshana told Babcock that he had four more trucks on the way and asked Babcock if they could dump. Babcock said yes.

Oshana asked if he could take a picture of the picket sign "to show Jeff Dunteman that he wasn't fucking around." Elsbree also testified that he heard Oshana say, "who has got the sign? I need to take a picture of the sign." Seminary took the picket sign from off his car windshield where it had been placed face down and standing in the Stella's parking lot held it up for Oshana to take a photo. (See, GC Exh. 5.) Oshana continued his "tirade" against Jeff Dunteman, saying that he was going to send the photo to Dunteman. Oshana complained that he does not report to Jeff Dunteman and he was "tired of this fucking around." He drove off, with phone in hand "like he was making a phone call," and "screaming that "mother fucking Jeff Dunteman fucked up my job." The union representatives left shortly thereafter, at around 11:30.

Oshana gave a different account of things. In contrast to Elsbree, Oshana claimed that when he pulled up, Seminary had the picket sign out, the three union representatives were actively picketing, and there were three Global trucks "just sitting there" waiting to unload. I do not believe that—or at least, I do not believe they were "just sitting there" because of the union representatives' presence. There is no question that Seminary had held a picket sign between 9 and 9:30 a.m., as set forth in the text above. However, I discredit Oshana's testimony that when he arrived at the site at about 11:30 a.m. the union representatives "were up there picketing." It is not just that this story was at odds with the credible, consistent, and detailed account of events told by Seminary, Babcock, and Elsbree, who arrived on the scene just about the same time as Oshana—although it is that, and I discredit Oshana's account on that basis. It is not just that the General Counsel did not produce a single witness to corroborate Oshana's testimony, and it should have been easy to do, if true, as this was, after all, a construction site, and not only the Global drivers but R.W. Dunteman employees must have witnessed events. It is also the enthusiasm—that's the best word I can think of—with which he testified to this point. Indeed, Oshana not only claimed that he encountered Seminary picketing and took a picture of it, but he also claimed that the photograph he took "shows three Teamster from 179 striking my job" although all could see that it does not. (See, GC Exh. 5.) Moreover, the photo clearly was taken in the Stella's parking lot—in the photo behind Seminary are parked cars and a sign

marked "Stella's patrons only."[12] The Union was not picketing in the Stella's parking lot and Oshana did not take a picture of Seminary actually picketing there.

I listened carefully to Oshana's testimony, and strained to make sense of it. His claim that the Union prohibited the Global trucks from dumping boiled down to the union's effort to talk to the Global drivers, which by all evidence, he did not witness. Putting aside the dispute over whether the Union was even interviewing the drivers by the time Oshana arrived, I just do not believe Oshana's claim that the Union spent 15–20 minutes delaying each successive Global truck by trying to interview them. (Neither, apparently, does the General Counsel, who endorses Seminary's testimony (Tr. 427) that each delivery took 5–7 minutes "tops." (GC Br. at 16)).

More, generally, and although it is not determinative of the outcome of this case, I do not accept much of Oshana's testimony. He describes a more pointed argument with the union representatives and with them declaring he is "shut down." Although missing from his direct testimony, by cross-examination Oshana was saying that "around noon, the 179 Teamsters said these trucks are being thrown off the job," and told the truck "don't come back," but then admitted that he did not witness any truck being told not to come back. By his redirect examination Oshana was claiming that Babcock directly "told me I am throwing your trucks off the job." Seminary and Babcock denied that anyone during the encounter with Oshana said anything about the Union shutting the job down. Oshana claimed that the Union "threw all my trucks off the job" but his testimony was very uncertain in demeanor and hard to follow in this regard. He contended that because of the Union's request, essentially Babcock's demand, the anticipated 30 loads from Global ended after the 20 or 21st load, which included the four trucks en route that Babcock permitted. However, Oshana could not explain the process by which the (approximately) nine loads were cancelled or did not show up. He claimed that the Union "threw all my trucks off the job," but there is no evidence at all to suggest that the union representatives personally or physically did this. Oshana denied that he meant that the union representatives personally or physically took action, but would not or could not say what he did mean. Oshana denied that he directed that no more Global trucks come to the site after he spoke with Babcock, he just kept insisting that "[t]he Teamster 179 would not allow the trucks to come back to the job site" and that "Teamsters threw the trucking company we were using off the job site." Oshana denied that he decided whether or not the trucks would come back, and denied that it was his call (Tr. 159), but then, almost immediately agreed that it was "initially" his decision whether trucks come or do not come to the job site. He claimed that the Global trucks "were instructed by the 179 not to return," but then agreed he did not witness that—rather, he just knew that the trucks, "they didn't come back." He insisted that he did not direct Global or Crush Crete to stop sending Global trucks to the Weber Road site and did not know why they stopped coming that afternoon. (Tr. 198.) Notably, in his testimony, Jeff Dunteman contradicted Oshana, and directly attributed the cancellation of the additional Global loads to Oshana ("Emsi, our customer, is the one that had to cancel the loads"), an admission that I consider more likely than not to be true.

All in all, I would only be able to speculate as to the motive for Oshana's cryptic and inconsistent, obdurate testimony. His testimony struck me as someone determined and devoted to avoiding revealing certain things, while making sure to stress other points. It seems likely to me that he was covering for someone else, or was acting under outside direction about what he should or should not say. I am not going to guess. But the debacle leads me not to credit his testimony on any issue where other witnesses dispute his account, and I am

[12]Fortunately, it is beyond our purview to enforce Stella's parking lot rules and regulations.

suspicious even about some of his testimony where no witness testified who was in a position to dispute what he said. In sum, and for these reasons I credit the account of Seminary, Babcock, and Elsbree about what happened at the R.W. Dunteman's Weber Road site on June 23.[13]

The phone call and alleged threat

Elsbree testified that he called Jeff Dunteman on June 23, as he was leaving the Weber Road job site, at about noon. He called Jeff Dunteman's cell phone and left him a message introducing himself, referring to the noncompliance letter he had sent and asking for a return phone call. Elsbree did not hear back and called Jeff Dunteman again about 2 p.m. This time Dunteman answered the phone and they spoke.

Jeff Dunteman's testimonial account of the June 23 phone call with Elsbree differed sharply from the account offered by Elsbree. To begin with, they do not agree on when the call occurred.

Dunteman claimed the call occurred at about 10:30 a.m., or about one hour after he first spoke to Oshana. Elsbree says they spoke at about 2 p.m.. This is significant dispute, because it affects the context: did the call occur at in the morning before Oshana encountered Whitcomb, Seminary, Brown, and Elsbree, at the Weber Road site? Or did it occur several hours later, well after the union activity had ended at Weber Road. If the latter, it complicates the General Counsel's claim that the Weber Road incident was the fruition of threats in made in the call.

Elsbree's claim that he spoke with Jeff Dunteman about 2 p.m. is corroborated by records. A call to Dunteman—at 2:04 p.m., from Elsbree's cell phone to Dunteman's—is documented by Elsbree's phone records introduced into evidence. The records show that Elsbree called Dunteman—and the call went for 7 minutes—beginning at 2:04 p.m., which is consistent with Elsbree's testimonial claim. Elsbree's contention is also corroborated by the phone records' showing of a 12:07 p.m. call to Dunteman—which lasted two minutes. Elsbree had testified that he called Dunteman and left a voice-mail message for him at just about this time, as Elsbree was leaving Weber Road site. Elsbree's contention is further corroborated by the phone records showing a 2:14 p.m. call to Whitcomb's number for 25 minutes, consistent with the Elsbree's testimony that after he hung up with Jeff Dunteman he called Whitcomb to report on the call. The phone records further substantiate Elsbree's claim that he made an eight minute call to Dunteman the next morning at 8:34 a.m. These records are powerful evidence that these calls were made from Elsbree's cell phone to Jeff Dunteman's at the times indicated, as claimed by Elsbree.

Dunteman provided no phone records. The General Counsel suggests that the 10:30 a.m. call may have been made from Elsbree's office phone, for which no records were offered (or, it would follow, subpoenaed). Of course, it is possible that there was an additional call. The phone records of the afternoon phone call do not necessarily or affirmatively prove there was no other call from another phone at about 10:30 a.m. June 23. But the fact is that Dunteman does

[13]Although Oshana's and the union representatives' accounts of events the morning of June 23 at Weber Road varied tremendously, I note that my determination of what occurred has minimal impact on the outcome of the case. As discussed below, the June 23 encounter at Weber Road is not alleged by the General Counsel to be independently unlawful, but rather, simply evidence that the Union's conduct had a proscribed secondary objective, a matter I assume without deciding.

not claim that he had multiple phone talks with Elsbree on June 23. Indeed, he testified that he only recalled one phone call with Elsbree on June 23. I find that that their phone call occurred at 2:04 p.m., consistent with Elsbree's testimony.[14]

As to the substantive dispute of what was said in this call, Elsbree testified that he introduced himself and confirmed that Dunteman received the noncompliance letter. Elsbree testified that Jeff Dunteman told him he had just seen it, as it had not been sent to him, but to his brother.[15] According to Elsbree, the two argued over whether the Global trucks were only doing stockpiling work, with Elsbree testifying that he said, "Jeff, it has nothing to do with that. This is economics. This only has to do with the negotiated wages and benefits." Elsbree testified that he offered Dunteman "an attestation letter saying that your subcontractors will uphold this area standards according to the contract and they can come work." However, according to Elsbree, Dunteman "just wanted to argue about stockpiling." In his testimony, Elsbree denied that he threatened to shut down Dunteman's job sites or demanded that only union signatory companies haul materials to Dunteman jobs.

For his part, Dunteman testified that when Elsbree called,

> He was mad the Global Transport trucks were coming down and dumping in stockpiles and that I am supposed to stop loading them and if I didn't, he is going to shut down the job on the Weber Road and we had we had a nice discussion when I called about that I am going to continue to bring the material down there with any truck that I have available until we send the 30 loads down there which is what was ordered.

Asked what Elsbree's response was when Dunteman told him that he intended to continue to deliver the 30 loads with Global, Dunteman responded:

> He told me, well, they are non-Union trucks and if there is non-Union trucks on that job, that he is going to shut down the project, in other words, by I would assume it meant throwing up a picket line. . . .
>
> Okay. He told me that he is going to shut down the job there and if I continue to send trucks with material down there, he is going to come up here to Addison and shut our operation down up here as well.

[14]Contrary to the General Counsel's claim (GC Br. at 9 fn. 6), Elsbree affirmatively denied the call was made from his office phone. (Tr. 362–363.) And also contrary to the General Counsel's claim (GC Br. at 19), Elsbree did not initially testify "that he could not recall if he made calls from another phone" to Dunteman on June 23. This is not an accurate account of his testimony. Elsbree was asked: "Do you recall if you made any calls to Jeff Dunteman from a different phone [and not his cell phone] on June 23rd." (Tr. 357.) Elsbree responded: "I don't recall that, no." Witnesses often do not recall something because it did not happen, and having heard Elsbree's answer, I am sure that is what he meant here. Counsel is putting more weight on this exchange than it can carry.

[15]Dunteman testified differently, claiming that he did not receive the letter until about 4 p.m. on June 24, when his brother emailed it to him.

Dunteman testified that he told Elsbree that he didn't "want him to do that" and that "he can try and do that [shut down Crush Crete] but I am going to load the trucks myself if need be."

Dunteman testified that the main thrust of the discussion was over the use of nonunion trucks and their use in work that he considered stockpiling but that Elsbree characterized differently. Dunteman's testimony suggests that both he and Elsbree agreed that the Global trucks should be dumping in stockpiles, but they disagreed on whether that was happening. Dunteman maintained that Global's delivery of materials, even to the roadbed, was "stockpiling on the site."

According to Dunteman, the issue of area standards and the wages and benefits paid to the Global drivers did not come up in the conversation.

Notwithstanding his testimony about shutdown threats, Dunteman also testified that his conversation with Elsbree was "business as usual":

> When Greg and I got off the phone, just like we have done numerous times prior to his particular date . . . we have agreed that if there was a particular truck that was hauling on or off the job site, basically doing work on the project, we have usually or always signed them off. And so I looked at is as business as usual.
>
> We were done with our conversation that I took his threat of shutting down Crush Crete just as part of our argument. That was the purpose of my phone call on the 24th to him. . . .
>
> I am referring to just how we worked on every other occasion on 179's area when it came to trucking with Teamsters problems with the particular trucks we have hired, that Dunteman had hired, not Crush Crete, Dunteman. . . .
>
> When there has been an hourly truck working on the site and the 179 representatives have showed up, and I am speaking on behalf of Dunteman right now, and the truck wasn't . . . acceptable to 179, the project personnel had signed those trucks off. . . . [meaning] . . . [r]emoved them.

I will set forth my credibility resolutions as to Jeff Dunteman and Elsbree's June 23 phone call below. Before doing so I continue with my findings as to events occurring after the phone call, as some of the post-phone call events are relevant to my assessment of credibility.

June 24—bannering and inflatable rat; Jeff Dunteman and Elsbree talk again; Crush Crete & R.W. Dunteman counsel writes to the Union

The afternoon of June 23, just after finishing his call with Jeff Dunteman, Elsbree talked to Whitcomb again. Whitcomb and Elsbree discussed putting up a banner and inflatable rat in front of Crush Crete. On cross examination, Elsbree he described also talking with Jeff Brown too, although it is unclear if Brown was on the call with Whitcomb, or whether Elsbree spoke separately to him. They discussed that the banner would say that Crush Crete is hiring "rat subcontractors." Elsbree described the decision to up the banner as a "mutual decision between [Locals] 179 and 673." Elsbree asked Whitcomb not to set up on the Crush Crete property and to be away from the entrance of the facility.

Ultimately Elsbree approved the spot where the bannering took place the next morning, June 24, about 0.4 of a mile down the road from the entrance to the R.W. Dunteman and Crush Crete property in Addison. Whitcomb and Local 179 business agent Jeff Brown set up the banner and inflatable rat on the northeast corner of Rohlwing Road and Dunteman drive at about 7 a.m. The banner read:

SHAME ON
CRUSH CRETE
FOR USING
RAT SUBCONTRACTORS

About 10–15 minutes after the Union set up the banner and rat, Matt Dunteman pulled up in his vehicle. Eventually Jeff Dunteman came too. There was an encounter between the parties concerning which I did not permit evidence to be introduced, after sustaining objections based on its lack of relevancy. However, a little later in the morning Jeff Dunteman returned and a recording of the conversation between he, Brown, and Whitcomb, was offered into evidence. That recording, Respondent Exhibit 9, and an agreed upon transcript of the recording, Respondent Exhibit 10, set forth a portion of the conversation between the three men as Jeff Dunteman sought to photograph the union representatives. In the recording, Jeff Dunteman asserts that the day before he told Whitcomb that "I'd stop sending the trucks." Dunteman also states that he "committed to the . . . 179 guys to stop sending those Global trucks." He further states that he told Elsbree the day before that "we stopped shipping yesterday." Dunteman states, "We honored the Global request. We honored that."

The men then argued about whether the Global trucks were stockpiling. Dunteman said, with regard to what the Global trucks were doing, "I disagree with you, we were stockpiling on [our or the][16] project." Brown replied, "It's not stockpiling when you're spreading it on a road bed, that's not stockpiling." Dunteman answered, "Yes, it is. It's stockpiling on the site." Brown responded, "Stockpiling is one big pile." The parties then returned to discussing Dunteman's efforts to photograph the other two.

The banner and rat remained up until about 10:30 a.m., at which time Brown and Whitcomb left. There was no work disruption or picketing at any time that morning.

Elsbree was not present for the bannering, but heard reports of it and the confrontation between the Dunteman brothers and Brown and Whitcomb. Elsbree and Jeff Dunteman spoke that morning. As with their account of their conversation the previous day, they give very different accounts of this phone call. Elsbree says that he called Dunteman about 8:30 a.m. Dunteman claims he called Elsbree. Elsbree's phone records back him on this. They show a call to Dunteman's number at 8:26 a.m. that lasted 8 minutes. As no one claims there was more than one call, I find that this was it.

Elsbree says he called Jeff Dunteman about 8:30 and chastised him for the confrontation he had with the union representatives. Elsbree testified he told Dunteman that

> I was very disappointed that he has not reached out to me. He has never called me. This was my third or fourth contact to him to try to rectify his company for Dunteman and I told him I was very disappointed that we could not talk about

[16]The parties disagree about whether the word at this point on the recording is "our" or "the." I do not resolve that dispute, which is not material.

> Global Transportation delivering on the roadbed. He . . . would not talk to me about that.

Elsbree testified that he received no commitment from Dunteman in the phone call about whether he was going to continue to use Global.

Dunteman's account of the call was different. He testified that he was angry that the rat and banner were being erected outside the road to the Crush Crete and R.W. Dunteman property. As Dunteman explained,

> what I understood, the situation was over. We stopped sending Global trucks down . . . . I thought I took care of it and for me to show up here and have the rat up there, I was asking why would you start something up here and he told me that he didn't like my answer yesterday that I am going to continue to operate both of our operations whether it was the Weber Road job or the Crush Crete job and he told me that's why he sent the rat. He wanted to make the point that he thought I wasn't doing something correctly.

Jeff Dunteman testified that he was upset because he thought that the matter had been resolved the day before when, he says, he agreed to stop using the Global trucks, something he also can be heard on tape telling Whitcomb and Brown when he confronted them about their rat and banner. Dunteman testified that,

> it was my belief that on the 23rd that that was the end of it because the threats down on the project that were made to Emsi [Oshana] and him not wanting to deal with 179, doing whatever they were doing to Emsi down there, because Emsi, our customer, is the one that had to cancel the loads.

On June 24, Crush Crete and R.W. Dunteman's attorney sent a letter to Local 179's president, Tom Flynn, protesting the Union's recent actions. The letter, from Attorney Matthew Robinson, stated that his firm represented Crush Crete and R.W. Dunteman. The letter referenced

> recent attempts to coerce both companies to cease doing business with nonunion material hauling trucking companies and picketing of Crush Crete for "using a rat subcontractor." The Union's activities are illegal under Section 8(e) of the National Labor Act and constitutes illegal secondary activity under Section 8(b)(4)(B).

The letter continued:

> R.W. Dunteman is General Contractor on the Weber Road Project in Will County. Crush Crete is a material supply company that contracts with trucking companies to haul its materials to customers, including to the Project. Yesterday, the Union told R.W. Dunteman that it must stop allowing non-union signatory trucking companies to deliver materials to the site. This morning, Teamsters Local 179 placed an inflated rate and sign reading "Shame on Crush Crete for using a rat subcontractor" and picketed outside of Crush Crete's location.

> Attempting to coerce R.W. Dunteman and Crush Crete into utilizing only union-signatory trucking companies is a textbook violation of the hot cargo clause and the Union's activity is illegal secondary activity. . . .
>
> Teamsters Local 179 must immediately cease its illegal activity and picketing or it will face any one or more of unfair labor practice charges, an injunction, or a federal lawsuit for damages under the Labor Management Relations Act.

Credibility resolutions regarding the phone call and alleged threat

The General Counsel alleges that in the June 23 phone call between Elsbree and Jeff Dunteman, Elsbree threatened to shut down the Weber Road project and the Crush Crete Addison operation if Crush Crete did not cease subcontracting to Global. The General Counsel bears the burden of proof on whether these threats were made.

At a minimum, I find Elsbree's denial that he made such threats to be no less credible than Dunteman's claim. Accordingly, I find that the General Counsel has failed to establish that Elsbree threatened to shut down Crush Crete and/or R.W. Dunteman. See generally *Central National Gotteman*, 303 NLRB 143, 145 (1991); and *Blue Flash Express*, 109 NLRB 591 (1954) (finding that the General Counsel failed to carry the burden of proof where conflicting testimony was equally credible).

But in considering the record as a whole, I am willing to go further and affirmatively discredit Dunteman's claim that Elsbree threatened to shut down Crush Crete and/or R.W. Dunteman. For one thing, for the reasons explained above, I credit Elsbree's testimony that the phone call took place at around 2 p.m. on June 23, and I discredit Dunteman's claim that the call was in the morning. This adds to my trust in Elsbree's testimony about the phone call on the critical issue of the threat, and undermines my faith in Dunteman's on this critical issue.

Moreover, in assessing this key issue to the case, I am struck by the complete lack of corroborating evidence for the alleged threat. There is not a contemporaneous note or email describing the threat. There is not a single witness who described hearing from Jeff Dunteman (or Elsbree, for that matter) that Crush Crete and/or R.W Dunteman was threatened with a shutdown during the phone call. Notably, the June 24 recorded encounter between Whitcomb, Brown, and Jeff Dunteman, contains no suggestion that Jeff Dunteman had been threatened the previous day.

Even more notable is that when Crush Crete's and R.W. Dunteman's attorney wrote to Local 179 on June 24, the day after the phone call, the letter fails to mention Elsbree's alleged threat. The letter recited the events of the last couple of days but focused on the incident with R.W. Dunteman at Weber Road, and the rat and bannering the next day. The letter stated,

> Yesterday, the Union told R.W. Dunteman that it must stop allowing non-union signatory trucking companies to deliver materials to the site. This morning, Teamsters Local 179 placed an inflated rat and sign reading "Shame on Crush Crete for using a rat subcontractor" and picketed outside of Crush Crete's location.

The threat to shut down Crush Crete and R.W. Dunteman, allegedly made in a phone call to Crush Crete's president, Jeff Dunteman, is not mentioned in the letter. This is highly

significant. The letter complains of the Union telling R.W. Dunteman that it must stop allowing nonunion signatory trucking companies to deliver materials to the site—presumably this is a reference to Local 179's June 23 interactions with Oshana at the Weber Road site. But there is no reference to telling this to Crush Crete, or telling this to Jeff Dunteman, or threatening to shut down Crush Crete and/or R.W. Dunteman. Elsbree's alleged threat to Jeff Dunteman is central to the case. The failure to corroborate Jeff Dunteman's testimony on the "threat" in a letter from counsel setting forth the relevant events is highly significant. The threats were likely to have been mentioned, if true, or, at least, if contemporaneously reported by Jeff Dunteman (and if they were not contemporaneously, reported, that itself is suspect).

On top of this, we have Jeff Dunteman's admission that the call with Elsbree was "business as usual," and that he considered the matter a "done deal." Jeff Dunteman testified that in his view the whole incident had been resolved based on R.W. Dunteman's Oshana honoring the Union's request to remove the Global trucks. (Tr. 100–102.) In other words, the matter was already resolved by the time Elsbree and Jeff Dunteman spoke. This makes the threat less likely, as there was no need for it. Indeed, precisely because the matter was resolved, Jeff Dunteman was surprised and angered by Whitcomb and Brown setting up the bannering outside of his Addison facility on June 24. Dunteman thought the matter "a done deal"—as Jeff Dunteman explained in his recorded confrontation on the morning of June 24 with Whitcomb and Brown. In that recording, he had indicated that he had told Whitcomb the previous day that "I'd stop sending the trucks" and stated that he had also committed to "the 179 guys to stop sending those Global trucks." Again, none of this is conclusive proof that Jeff Dunteman was not threatened but it hardly corroborates his claim. The matter was "a done deal" by the time Elsbree caught up with Dunteman—there was no motive to make the threats.

I add here that the recorded conversation between Jeff Dunteman and Whitcomb on June 24, adds to the puzzle and strongly suggests to me that the full story of the June 23 phone call was not presented in the testimony. Specifically, Jeff Dunteman's adamancy in his June 24 conversation that the day before he had committed to Local 179 that he would not use the Global trucks, and his effective admission that he had done something wrong (he said he needed to be spanked), just do not fit with Dunteman's (or Elsbree's for that matter) account of the June 23 phone conversation. While I am uncertain how the June 24 comments fit into things, they do not bolster the account of the June 23 conversation testified to by Jeff Dunteman.

Finally, I was not impressed by Jeff Dunteman's demeanor regarding his account of the call. He seemed insistent on summarizing the key points he wanted to make, but not so careful about recounting the conversation itself. At the same, time, I agree that Elsbree engaged in some of that himself. He was not entirely convincing either. I tend to believe, as Dunteman testified, and as Elsbree denied, that the issue of stockpiling was extensively discussed during the conversation—there was a disagreement about whether what Global was doing was stockpiling and even what it means to stockpile. But on the key issue of the threats—I am unconvinced. It has not been shown that it is more likely than not that they occurred. It is unproven. Accordingly, I find that the threats did not happen.[17]

[17]The General Counsel and the Charging Party argue vigorously that the rat and bannering on June 24, and the Seminary picket on June 23, corroborate the threat. In essence, they argue that this is the threat being carried out. I do not agree with that. To the contrary, as I have found, the Seminary picket—which, in any event, is not alleged to be unlawful—was over and done with by the time Elsbree and Jeff Dunteman spoke. As to the rat and bannering, they

Analysis

The complaint alleges related but distinct violations. First, the General Counsel alleges that in his June 23 conversation with Jeff Dunteman, Elsbree, on behalf of the Union, violated Section 8(b)(ii)(4)(B) by unlawfully threatening to shut down Crush Crete and R.W. Dunteman for the improper objective of (i) having Crush Crete and R.W. Dunteman cease using Global to deliver its aggregate to the Weber Road jobsite, and (ii) for the improper objective of having Crush Crete comply with Article 3.1(b) of MARBA, alleged to be a "hot cargo" clause. Second, the General Counsel alleges that the Union independently violated Section 8(e) of the Act by entering into Article 3.1(b) of the MARBA contract, contending that portions of that provision, on its face, run afoul of the Act's restrictions on "hot cargo" agreements.

I. The alleged 8(b)(4)(ii)(B) violation

Section 8(b)(4)(ii)(B) makes it "an unfair labor practice for a union to

> threaten, coerce, or restrain a person not party to a labor dispute 'where … an object thereof is . . . forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person.'"

29 U.S.C. § 158(b)(4)(ii)(B).

As the statutory language plainly states, in order to find that a union has violated Section 8(b)(4)(ii)(B), the General Counsel must prove not only that the union's object is improper—e.g., the improper object of requiring a secondary employer to cease its business with another, or enforcement of an unlawful 8(e) agreement—but also that it is pursuing the improper objective through improper means.

Thus, the Act does not bar all conduct that might persuade the neutral employer. Rather to constitute a violation of 8(b)(4)(ii)(B), the union must communicate an intent to cause harm or engage in some other form of compulsion. In the words of the statute, it must "threaten, coerce, or restrain." See, *IUOE, Local 150 (Lippert Components)*, 371 NLRB No. 8, slip op. at 4 (2021) ("Section 8(b)(4) does not prohibit all union activity having the proscribed secondary objective of 'forcing or requiring any person to . . . cease doing business with any other person.' Instead, as relevant here, Section 8(b)(4)(ii)(B) makes it an unfair labor practice for a union, with that proscribed objective, to "threaten, coerce, or restrain any person.'") (quoting 8(e)) (Members Kaplan and Ring, Concurring).

Here, the General Counsel alleges specifically, and only, that the Union violated Section 8(b)(4)(ii)(B) through the alleged threat by Elsbree to Jeff Dunteman in their June 23 phone call to shut down Crush Crete and R.W. Dunteman. See, GC Exh. 1(m) at ¶ VI(d); See, GC Br. at 17–21. Neither the June 23 picket nor the June 24 bannering is alleged to be unlawful. See, e.g., General Counsel's statement at Tr. 97, endorsing Union's view of the case at Tr. 20.

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were placed on the roadside far removed from the actual entrance to R.W. Dunteman or Crush Crete—it does not seem like an attempt to shut down either facility. And notably, the General Counsel does not allege that the rat or banner was unlawful activity. If it was a warning to R.W. Dunteman and/or Crush Crete, it was a lawful one, and not persuasive corroboration that an unlawful threat to shut down Crush Crete and R.W. Dunteman had been made the day before.

Assuming without deciding that (at least one of) the union's objectives in this dispute was improper,[18] I have not found, as alleged, that during his conversation with Jeff Dunteman, Elsbree threatened R.J. Dunteman or Crush Crete in pursuit of its objectives.

In the context of 8(b)(4)(ii)(B), improper or secondary objectives without improper means is no violation. As long as he did not threaten, coerce, or restrain, Elsbree was not violating Section 8(b)(4)(ii)()B) by calling Jeff Dunteman and complaining about Crush Crete's decision to use Global trucks to deliver to the Weber job site, whether or not his object was area standards as he claims, or secondary, as the General Counsel claims. In this case, the General Counsel has limited his claim of improper means that violate 8(b)(4)(ii)(B) to the claim that in his June 23 call with Jeff Dunteman, Elsbree threatened to shut down Crush Crete and R.W. Dunteman. For the reasons stated above, I find he did not. With that unproven, the General Counsel's case must be dismissed. Accordingly, I dismiss the 8(b)(4)(ii)(B) allegation.

2. The alleged 8(e) violation

The General Counsel alleges (GC Br. at 14–17) that Article 3.1(b) of MARBA is, on its face, violative of Section 8(e), and, therefore, by being party to the MARBA agreement, the Union is in violation of Section 8(e) of the Act.

Section 8(e) of the Act forbids entry into a collective-bargaining agreement whereby an employer agrees to refrain dealing in the product of another employer or to cease doing business with any other person. The text of Section 8(e) provides in pertinent part:

> It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void[.]

Section 8(e) contains a proviso permitting agreements between a union and an employer in the construction industry relating to subcontracting work "to be done at the site of the construction." The proviso states, in pertinent part:

> Provided, That nothing in this subsection (e) [this subsection] shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work.

Notwithstanding the breadth of 8(e)'s language, it is settled that in enacting this provision, "Congress meant that . . . 8(e) reach only secondary pressures." *National Woodwork*

[18] *NLRB v. Denver Building & Construction Trades Council*, 341 U.S. 675, 688–689 (1951) ("It is not necessary to find that the sole object of the strike was that of forcing the contractor to terminate the subcontractor's contract," is enough to find that "[i]t was *an* object of the strike") (emphasis added); *IBEW Local 6 (Intercontinental Hotels)*, 286 NLRB 680, 685 (1987) ("if one of the objects of the picketing was unlawful, it is immaterial that Respondent had a legitimate interest in protesting what it believed to be Telarian' s substandard wages").

Manufacturers Association v. NLRB, 386 U.S. 612, 638 (1967); *NLRB v. ILA*, 473 U.S. 61, 74–75 (1985) (reaffirming the principles of *National Woodwork*). The Court in *National Woodwork* found that "Congress in enacting § 8(e) had no thought of prohibiting agreements directed to work preservation." 386 U.S. at 640. Such agreements "are not used as a sword" to achieve secondary objectives, but as "a shield carried solely to preserve the members' jobs." Id. at 630. Indeed, it's literal language notwithstanding, the "touchstone" of whether an agreement violates Section 8(e) is "whether the agreement or its maintenance is addressed to the labor relations of the contracting employer vis-à-vis his own employees" or, rather, "tactically calculated to satisfy union objectives elsewhere." *National Woodwork Manufacturers*, 386 U.S. at 644. Thus, [i]t is well established . . . that contract clauses which may technically fall within the literal proscription of Section 8(e) are not unlawful if the clauses are found to have the primary objective of preserving or protecting work performed by the contracting employer's employees." *Joint Council of Teamsters No. 42*, 248 NLRB 808, 813–814 (1980), enfd. 702 F.2d 168 (9th Cir. 1983). As the Board explained in *Road Sprinkler Fitters, Local 669 (Cosco Fire Protection)*:

> despite the broad, literal language of Section 8(e), a contract clause is lawful, despite a cease-doing-business objective, if the clause has the primary objective of preserving work performed by the employees of the employer bound by the clause, rather than the secondary objective of satisfy[ing] union objectives elsewhere. In other words, [a]lthough 8(e) does not by its terms distinguish between primary and secondary activity, the Supreme Court has held that Congress intended to reach only agreements with secondary objectives.

357 NLRB 2140, 2141 (2011) (internal citations, quotations, and footnote omitted) (Board's bracketing).

In addition to the requirement that for a contractual clause to violate 8(e) it must have a secondary objective, Board precedent is clear that the agreement must be one in which an employer "agrees to refrain from dealing in the products of another employer or to cease doing business with any other person." In *Heartland Industrial Partners*, 348 NLRB 1081, 1082–1083 (2006), petition for review dismissed, 265 Fed. Appx. 1 (D.C. Cir. 2008), the Board explained:

> Section 8(e) of the Act generally forbids parties from entering into an agreement in which an employer "agrees to refrain from dealing in the product of another employer or to cease doing business with any other person." *Iron Workers (Southwestern Materials)*, 328 NLRB 934, 935 (1999). The General Counsel can establish the cease doing business element of Section 8(e) by "proof of prohibitions against forming business relationships in the first place as well as requirements that one cease business relationships already in existence." *Carpenters District Council of Northeast Ohio (Alessio Construction)*, 310 NLRB 1023, 1025 fn. 9 (1993) (citing *Ets-Hokin Corp.*, 154 NLRB 839, 840 (1965), enfd. 405 F.2d 159 (9th Cir. 1968). Section 8(e)'s reach, however, is not limited to agreements that on their face require a total cessation of business relationships. See *Longshoremen ILA Local 1410 (Mobile Steamship)*, 235 NLRB 172, 179 (1978). Thus, to establish a violation of the cease doing business element, "it need not be shown that a cessation of business has occurred or is inevitable, it is enough to show that the agreement offers the alternatives of a cessation of business or of adopting other injurious courses of action. An agreement which presents neutral employers with such options gives them 'no real choice.'" *Teamsters Local 85 (Southern Pacific Transportation Co.)*, 199 NLRB 212, 215 (1972) (citations omitted).

Finally, in assessing the legality of the alleged 8(e) violation, the Board

> in a line of decisions, has evolved what are essentially rules of construction . . . Thus, if the meaning of the clause is clear, the Board will determine forthwith its validity under 8(e); and where the clause is not clearly unlawful on its face, the Board will interpret it to require no more than what is allowed by law. On the other hand, if the clause is ambiguous, the Board will not presume unlawfulness, but will consider extrinsic evidence to determine whether the clause was intended to be administered in a lawful or unlawful manner. In the absence of such evidence, the Board will effuse to pass on the validity of the clause.

Teamsters Local 982 (J.K. Barker Trucking Co.), 181 NLRB 515, 517 (1970); affd. 450 F.2d 1322 (D.C. Cir. 1971) (footnotes omitted). Accord, *Ets-Hokin Co.*, 154 NLRB 839, 840–841 (1965), enforced, 405 F.2d 159 (9th Cir. 1968); *Road Sprinkler Fitters, Local 669 (Cosco Fire Protection)*, 357 NLRB at 2142 ("the complaint alleges only that addendum C is facially invalid. Therefore, we must construe the [agreement] to comport with Section 8(e) if possible").

With these precepts in mind, we must consider the text of Article 3.1(b), restated here:

> The Employer agrees that stone, stabilized base materials, sand and gravel will be spread or distributed on a construction site including road beds, exclusively by employees covered by this Agreement. Deliveries of stone, stabilized base materials, sand and gravel by employees, firms or entities not covered by this Agreement shall be made exclusively to stock piles and the Employer ordering those materials for delivery by a third party is responsible to see that the provisions of this Section are not violated provided that the Union shall hold the Employer harmless for suits or demands under this Section not in accord with federal law.

In this case, I agree with the General Counsel and the Charging Party that the second sentence of Article 3.1(b) restricts deliveries of stone, base materials, sand, and gravel, by nonsignatory subcontractors to stockpiles, and thus, by implication, would render violative of the MARBA agreement nonsignatory subcontractor deliveries to other locations on the construction site.

The General Counsel, seconded by the Charging Party, insists that this is the end of the matter. They contend, essentially, that Board precedent guarantees nonsignatories unfettered access to deliver materials originating offsite to any onsite location and that any contractual delineation of where onsite these goods are to be delivered is facially transgressive of Section 8(e).

I do not believe I am overstating their position, but I do believe they are overreading the case precedent. Indeed, as discussed momentarily, the General Counsel's position has flatly been rejected by the Board. In essence, the General Counsel would turn Section 8(e) on its head by assuming the secondary objective that the Supreme Court has made clear that he must prove. Moreover, the "cease-doing-business" element of an 8(e) violation is left entirely unaddressed and unproven by the General Counsel.

In mounting their case, the General Counsel and Charging Party rely on cases generally establishing that delivery of materials to construction sites from offsite locations is not "work to be done at the site of the construction," and thus, not within the proviso. Under these cases, contracts that bar deliveries from nonsignatories have been found to run afoul of Section 8(e).[19]

So far so good. However, on its face, does Article 3.1(b) prohibit any nonsignatory contractors from making deliveries? Does the requirement under Article 3.1(b) that contractors deliver to stockpiles facially and necessarily evince a secondary objective? And just as important, has the General Counsel (or the Charging Party) shown that a provision limiting nonsignatory deliveries to stockpiles puts an employer such as R.W. Dunteman in the position of having to choose from the "alternatives of a cessation of business with the subcontractor or of adopting other injurious courses of action"? *Heartland Industrial Partners*, 348 NLRB at 1083. In other words, does such an agreement give employers such as R.W. Dunteman "no real choice" but cease business with the subcontractor? Id. (internal citation omitted).

All of this is required in order to find Article 3.1(b) facially violative of Section 8(e) but the General Counsel and Charging Party argue none of it. It is not self-evident from a reading of Article 3.1(b). On its face, Article 3.1(b) merely limits deliveries by nonsignatories to stockpiles, but does not bar nonsignatory deliveries, or, for that matter, impinge on an employer's right to place stockpiles wherever it chooses onsite. Contrary to the General Counsel's assumption, the unfettered "right" of a nonsignatory contractor to deliver anywhere onsite that *it* chooses is not a "right" found in or protected by Section 8(e).

Indeed, the Board has pointedly rejected the interpretation of 8(e) advanced by the General Counsel here. Thus, the very question presented here was considered and resolved in favor of the respondent union—and the 8(e) allegation dismissed—in *Teamsters Local 982 (J.K. Barker Trucking Co.)*, 181 NLRB 515 (1970), affirmed, 450 F.2d 1322 (D.C. Cir. 1971).

In *J.K. Barker*, the Board considered an array of construction project contractual provisions alleged (and found by the trial examiner) to violate Section 8(e).

One such provision was 104.1, which read:

> 104.1. So far as it is within the control of the Contractor or his subcontractors, all materials, supplies and equipment used on the job shall be transported to or from the site of the work by workmen covered by a collective bargaining agreement with the appropriate union. Nothing herein contained shall be construed to prohibit the normal delivery of freight by railroad.

[19]See, e.g., *Joint Council of Teamsters No. 42*, 248 NLRB at 816 (proviso does not apply to save provision of agreement requiring termination of dump truck owner-operators who transport material from offsite to various onsite construction locations); *Teamsters Local Union No. 89 (Robert McKee Inc.*), 254 NLRB 783, 786–787 (1981) ("It has long been held that the delivery of materials to a construction site does not constitute "onsite" work. Thus a subcontracting clause which purports to include the delivery of materials to the jobsite enjoys no protection under the construction industry proviso to Section 8(e)") (footnote omitted).

A second provision, 104.2, read, in relevant part:

> 104.2. A vendor, who makes deliveries of material, supplies or equipment and, who incidental to or as a part of the furnishing or delivery of material, supplies or equipment, does any work at the jobsite, shall be a party to a current collective bargaining agreement with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or one of its affiliates. *In the event a vendor is not party to such an agreement [with the Teamsters], he* shall not perform any jobsite work *except that deliveries may be made by such vendor to central storage areas, or storage tanks, for later distribution by employees covered by an appropriate current labor agreement* with *the appropriate union, or subordinate body, affiliated with the Building and Construction Trades Department, AFL-CIO, or with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or an affiliate thereof.* This sub-paragraph shall apply only to vendors and shall not be applicable to Contractors or their subcontractors or to their employees. Jobsite fueling by vendors shall not be covered by this sub-paragraph 104.2. where economically not feasible or practical provided that the actual fueling of the Contractor's or subcontractor's equipment is performed by employees of the craft operating such equipment or where such fueling is performed in any other manner as may be agreed upon.

181 NLRB at 517 fns. 13 & 16 (emphasis added).

The Board agreed with the trial examiner that 104.1 was unlawful, as "the meaning of section 104.1 is clear and that the clause is, on its face, a union signatory clause" that "sought to control the subcontracting of the work of delivering materials, products, and supplies to the construction site." 181 NLRB at 518.

With similar ease, the Board found the first sentence of 104.2—the portion before the highlighted portion set out above—to be lawful because, "[u]nlike the preceding section 104.1, we do not interpret the clause on its face to be a union signatory clause since it permits nonsignatory vendors to make deliveries of materials, supplies or equipment to the jobsite." 181 NLRB at 518. The Board held that when read in the context of 104.1 and the remainder of 104.2, the first sentence of 104.2 was—much as the first sentence of Article 3.1(b) in our case—primarily "a work protection clause . . .aimed at preventing vendors from performing any work at the jobsite *after* the delivery has been completed, work which would normally be performed by the principal work unit." 181 NLRB at 518 (Board's emphasis; footnote omitted).

But it is the Board's analysis of the second clause of 104.2—the portion highlighted above for clarity—that is of overriding relevance to the instant case before us. As to that portion, the Board rejected the contention advanced by the General Counsel in that case—and here—and held that the contractual restriction of nonsignatory deliveries to designated areas of the construction site was not a facial violation of Section 8(e) because, although regulating where onsite the materials could be delivered, "it appears to permit vendors to perform the necessary work in effecting a delivery to construction site." 181 NLRB at 519. As the Board explained in reasoning that is worth reproducing in full:

> The Trial Examiner found further that the second clause in section 104.2 is the same as section 104.1, interpreting the clause as restricting or regulating the place of delivery at the jobsite of materials, supplies, and equipment. Relying on

> *Island Dock*,[20] supra, he found that this work is the "final act of the delivery process" and not jobsite work. Accordingly, he found that the clause exceeds the bounds of the construction industry proviso to 8(e). We are of the opinion, however, that the second clause is not clearly unlawful on its face, since it appears to permit vendors to perform the necessary work in effecting a delivery to the construction site. In this respect, the instant clause differs from the clauses the Board found unlawful in the *Island Dock* and *Reynolds*[21] cases. In *Island Dock* the respondent union interpreted a clause in its agreement to apply to the pouring of ready-mixed concrete at the construction site. Since concrete cannot be dumped on the ground like other construction materials, the Board there held that the pouring of the concrete was the essence of the delivery and hence the final act of the delivery process. In *Reynolds*, supra, there was evidence showing that the respondent union interpreted provisions in its agreement as prohibiting truck driving employees of nonsignatory employers from even dropping their loads on the ground inside the construction site. Unlike those cases, there is no evidentiary basis for holding that the clause herein has a similarly unlawful effect.

181 NLRB at 519 (footnote omitted).

The Board's analysis of 104.2's second sentence and the resultant holding in *J.K. Barker* is on point here. It fatally undermines the General Counsel's claim here that Article 3.1(b) is facially violative of Section 8(e) simply by virtue of directing that deliveries be brought to a certain place on the job site, in our case, to stockpiles designated by the employer.

As in *J.K. Barker*, Article 3.1(b), on its face, does not limit deliveries to those from signatory contractors. Rather, the provision conditions only where onsite the nonsignatory contractors bring the base materials. *J.K. Barker* teaches that this is not facially unlawful. Moreover, Article 3.1(b) does not purport to be an attempt to control or force the alteration of the terms and conditions of employment for nonsignatory delivery employees delivering materials onsite from offsite. It merely directs that they drop off the materials at places designated by the employer as stockpiles. It does not limit or condition where the employer may place those stockpiles. Indeed, as is clear from the record in this case, the employers consider themselves free to establish stockpiles anywhere on site, including on the construction roadbeds. In other words, Article 3.1(b) "appears to permit vendors to perform the necessary work in effecting delivery to the construction site." *J.K. Barker*, 181 NLRB at 519.

In fact, the challenged provision in this case is less restrictive than the one approved by the Board in *J.K. Barker*. In *J.K. Barker*, the Board approved a provision that limited nonsignatory deliveries to "central storage areas, or storage tanks," a part of a construction site involving more stationary equipment less easily shifted than stockpiles, which are simply piles of base material of which there can be an essentially unlimited number created wherever and whenever the employer needs them.

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[20] *Teamsters Local 294 (Island Dock Lumber, Inc.)*, 145 NLRB 484, 491–492 (1963), enfd. 342 F.3d 18 (2d Cir. 1965).

[21] *Teamsters Local Union No. 631 (Reynolds Electrical and Engineering Co.)*, 154 NLRB 67, 69, fn. 4 (1965).

There is nothing inherently secondary about such a limitation. And just as in *J.K. Barker*, in the instant case, the relevant contractual clause, 3.1(b), when read in full context, evinces a work preservation objective. Article 3.1(b) begins by stating the parties' agreement that materials are to be spread and distributed exclusively by employees covered by the agreement. This is work preservation, and implicit is that deliveries are excluded from that rule. It is worth noting that the record establishes that R.W. Dunteman employs drivers, and owner-operators who work onsite and who transport materials between the stockpiles and the roadbeds. (Tr. 109, 215–216.) Thus, the evidence in the record is that the restriction of deliveries by nonsignatories to stockpiles, in fact, serves a work preservation objective.

There is also no grounds to believe that Article 3.1(b)'s restriction of nonsignatory deliveries to stockpiles will lead to the cessation of business with a nonsignatory. As the record demonstrates, there is obviously a wide area of disagreement between the Union and R.W. Dunteman over what a stockpile is and when a delivery is being made to one. That is not for us to iron out in a facial challenge but it demonstrates conclusively that there has been no acquiescence or agreement that Article 3.1(b) must be read in a manner that leaves an employer with no real alternative but to cease doing business with a nonsignatory delivery company.

The General Counsel and the Charging Party do not treat with *Teamsters Local 982 (J.K. Barker Trucking Co.)*. They do not contend that the wording of Article 3.1(b) evidences (much less must evidence) a secondary object. They do not contend that the wording of Article 3.1(b) dictates that a delivery subcontractor must sign MARBA. Nor do they show or even suggest that Article 3.1(b) leads to a situation where as a practical matter a contractor must cease doing business with a nonsignatory delivery subcontractor. Rather, their position—that Article 3.1(b) facially violates 8(e)—rests on what I consider an overreading of one case, *Teamsters Local 282 (Allco Concrete Products)*, 234 NLRB 770 (1978).

Allco did not purport to overrule *J.K. Barker*, and referenced it only in passing for the undisputed proposition "that driving to and from construction sites for the purpose of effecting deliveries does not constitute onsite work. 234 NLRB at 772. *Allco* presents a case with a history and a contractual clause ladened with factors condemned by the Board that make it specious to point to one single feature in it and rely on it for the proposition that, in what would be a sub silentio overruling of *J.K. Barker*, *any* employer and union agreement to limit or condition deliveries by a nonsignatory *in any way* facially violates Section 8(e) of the Act. *Allco* does not hold that.

Allco primarily concerned a concrete block producer, Allco, a nonsignatory, that delivered its product to a construction site operating under section 9 of a "high-rise" agreement—an agreement that the Board found in a predecessor case, *Teamsters Local 282 (D. Fortunato, Inc.)*, 197 NLRB 673, 678 (1972), to be a violation of Section 8(e) for its total ban on nonsignatory trucks at the worksite, including those entering and leaving the site. The only exception to this total ban was to permit nonsignatory trucks carrying goods from suppliers located outside of the New York metropolitan area to make a single delivery.

In the wake of the Board's decision invalidating section 9's ban on nonsignatory deliveries, the parties attempted a rewrite of section 9 that applied the signatory requirement to "all trucks at the site of the construction" but stated that the section did not apply "to the driving of a truck entering or leaving the site of construction for the sole purpose of making a single delivery and/or single pick up . . . provided such single delivery and/or pick up may be made only to (or from) a single location per delivery or pick up on the site." 234 NLRB at 771. Allco

was ordered to follow this rule under pain of a strike shutting down the project if it did not. Allco was able to complete only about 25 percent of its deliveries before being replaced with another concrete block company whose employees were represented by the respondent union.

In these circumstances, the rewritten section 9 contractual restriction in *Allco* did not pass muster with the Board, but *as a facial matter*—which is the only violation claimed here by the General Counsel—the clause in *Allco* was found to violate Section 8(e) only because of the limitation on the number of stops the trucks could make per delivery, not the limitation it imposed on the locations to which delivery was allowed, which is the issue in our case. The entirety of the ALJ's reasoning on this point, which was adopted by the Board is reproduced here:

> I find, therefore, that Respondent and BCA did not succeed in writing a new provision which would cure the defects found by the Board in Fortunato and that paragraph 2 of section 9 of the current high rise agreement is unlawful on its face and not entitled to the protection of the proviso to Section 8(e) of the Act. While section 9 of the agreement purports to deal solely with onsite work, the effect of its limitation to trucks making a single delivery or pickup is to subject trucks making more than one delivery to the operation of the subcontracting provisions of the first sentence of paragraph 2 of this section. As the Board has found even multiple deliveries to be offsite work, the limitation has the further effect of falling out of the ambit of the onsite proviso and therefore violates Section 8(e) of the Act.

The Board, adopted this reasoning and based on it, found the amended section 9 high-rise agreement facially unlawful. But this reasoning does not outlaw the clause because of limits on *where* deliveries can be made by nonsignatories but, rather, based on the limitation of how many deliveries can be made by the nonsignatories.

The Board went on in *Allco* to find in subsidiary holdings that "[m]oreover, Respondent unlawfully applied and enforced section 9 by restricting another subcontractor, Long Island Material Testing, from picking up test cylinders and leaving empties at a single location near the main gate of the construction site," condemning this practice because the facts showed that the restrictions were being used against Long Island Material testing because "Respondent sought additional work opportunities at the jobsite by having its members deliver and pick up the cylinders." 234 NLRB at 772. But that is not our case.

Thus, in *Allco*, the restriction on the locations to which deliveries could be made was condemned only *as applied*, based on the showing that the Respondent was applying the restriction in an effort to acquire work and not, as it claimed, in an effort to preserve work it had traditionally performed. In other words, the Board in *Allco* condemned the portion of the contractual clause limiting the location of deliveries based on its *application* to a work acquisition effort by the union. This alone distinguishes *Allco* from the instant case, which is limited to a facial challenge to the contractual clause and where the evidence is undisputed that R.W. Dunteman uses its employees and owner-operators working onsite (under the MARBA contract) to move materials from the stockpiles to the roadbeds, and vice-a-versa.

Because the General Counsel takes the view that any restriction on where nonsignatories can deliver wins the case, he makes no effort to counter the evidence of work preservation on this record. In any event, for a facial challenge to a contractual clause—as opposed to an applied challenge—*Allco* has nothing to say about a limitation on the locations to

which deliveries can be made. At most, *Allco* stands for the proposition that a combination of limitations on the number of deliveries and location points will eventually result in a contractual limit that the Board feels presents a facially obvious secondary and not a work preservation objective. However, in the face of *J.K. Barker*'s approval of a contractual clause that merely limited the location of deliveries, the General Counsel seriously overreads *Allco* by contending that limitation on number of delivery locations contained in the "high-rise" agreement can be held up as evidence that *any* contractual limitation on the location of nonsignatory deliveries is a per se violation of Section 8(e).

That is not an accurate reading of *Allco* and does not account for the Board's holding in *J.W. Barker* or the necessity to the schema of Section 8(e) of finding a secondary objective in the challenged clause.

That is enough to dismiss the General Counsel's facial challenge to Article 3.1(b), but there is more. As referenced supra, and as the statutory language makes clear, a finding of an 8(e) violation requires the existence of an agreement, express or implied, to cease doing business. *Heartland*, supra. See *Sheet Metal Workers, Local Union No. 91 v. NLRB*, 905 F.2d 417, 421 (D.C. Cir. 1990) ("As the text of the statute plainly states, the Board must find an 'agreement, express or implied, . . . to cease doing business with any other person' ") (citing Section 8(e)). Absent such an agreement to cease doing business, no Section 8(e) violation may be found. See *International Organization of Masters, Mates and Pilots (Cove Tankers Corp.)*, 224 NLRB 1626, 1626 (1976), enforced, 575 F.2d 896 (D.C. Cir. 1978).

The General Counsel's adherence to its "per se" theory of violation—in other words, its contention that a facial violation of 8(e) is fully proven based on there being any limitation as to where nonsignatories may deliver—leads it to ignore this required element of 8(e). It is far from self-evident or obvious that Article 3.1(b)'s limitation of nonsignatory deliveries to stockpiles would lead an employer to cease doing business with the nonsignatory or even be a burdensome or onerous requirement that would discourage continued business with the nonsignatory contractor. In situations short of a complete ban on nonsignatory deliveries, the Board looks for some evidence or reason to conclude that the restriction operates to, as a practical matter, to give the neutral employer "no real choice" but to forego continued use of the nonsignatory. *Heartland Industrial Partners*, 348 NLRB at 1083 (2006) ("to establish a violation of the cease doing business element, it need not be shown that a cessation of business has occurred or is inevitable, it is enough to show that the agreement offers the alternatives of a cessation of business or of adopting other injurious courses of action. An agreement which presents neutral employers with such options gives them 'no real choice." (internal citations and quotations omitted).

This can be shown in many ways, but it must be shown for the General Counsel to prove an 8(e) violation. For instance, in *Raymond O. Lewis (Galligan)*, 148 NLRB 249 (1964), enfd. 350 F.2d 801 (D.C. Cir. 1965), the Board considered a contractual provision that did not expressly require signatory coal operators to cease or refrain from doing business with nonsignatory subcontractors but exacted a prescribed financial penalty against the neutrals when they used a nonsignatory contractor. Testimony established the significant burden this penalty would impose on the signatory neutrals. In that circumstance, the Board found the necessary "cessation of business"-standard to have been met, relying on cases where "[t]he Board has held that clauses which grant a contracting employer the right to do business with noncontracting employers, but which impose a substantial penalty or sanction upon the exercise of such right, are in reality implied agreements that the contracting employer will refrain from doing business with the noncontracting employer." 148 NLRB at 253. The Board stressed that

"[i]n making this finding, we do not find . . . that the effect of the clauses necessarily will be to cause a complete cessation in the purchase of coal from nonsignatory sources. It is sufficient, in our opinion, that the clause will exercise a clearly restraining effect on such purchases, even though a complete cessation does not occur." Id. at fn. 13.

Here, Article 3.1(b) restricts nonsignatory deliveries of certain base materials to stockpiles. The burden of such a restriction to the onsite employers, if any, is unaddressed and unproven on this record. The record is clear that R.W. Dunteman felt free to establish stockpiles wherever it wanted. Nothing in Article 3.1(b) limits the employer's ability to put stockpiles wherever it chooses whenever it chooses. In the absence of some evidence that limiting deliveries of base materials to stockpiles requires "injurious courses of action" for employers or gives them "no real choice" but to avoid use of nonsignatory haulers, the Section 8(e) claim must be dismissed. *Heartland Industrial Partners*, 348 NLRB at 1083.

For all of the above reasons, the 8(e) allegation is dismissed.[22]

CONCLUSIONS OF LAW

The Respondent did not violate the Act as alleged in the complaint. On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[23]

[22]I do not reach the Charging Party's claim (CP Br. at 16–19) that the Union violated Section 8(e) by attempting to enforce Article 3.1(b) based on Seminary's June 23 picket of Global drivers. The General Counsel alleges only a facial violation of Section 8(e) and the Charging Party's contention is a nonstarter for that reason alone. *Fineberg Packing Co.*, 349 NLRB 294, 296 (2007) (the General Counsel is the "master of the complaint and controls the theory of the case"), enfd. 546 F.3d 719 (6th Cir. 2008). Accordingly, "A charging party may not expand the scope of the complaint without the consent of the General Counsel." *Planned Building Services*, 330 NLRB 791, 793 fn. 13 (2000). In any event, union picketing (or any other unilateral action) cannot be an 8(e) violation unless the clause at issue is facially violative of 8(e). I have found, it that Article 3.1(b) is not. The Union's unilateral interpretation of a contract clause to enforce an objective prohibited by Section 8(e), while potentially relevant to an 8(b)(4) allegation, cannot create an 8(e) violation. *McKee, Inc.*, 254 NLRB at 787 ("Respondent's attempt to compel McKee to accede to its interpretation provides no basis for finding that the contract clause in issue violates Section 8(e)"); *Sheet Metal Workers, Local 27 (AeroSonics Inc.)*, 321 NLRB at 540 fn. 3 (unilateral conduct of this kind may violate other provisions of the Act but it does not create an unlawful 8(e) agreement). Given my finding that Article 3.1(b) is not facially violative of Sec. 8(e), I do not reach the issue of whether the Union attempted to enforce that article of the contract, through the Seminary picket, or otherwise.

[23]If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

The complaint is dismissed.

Dated, Washington, D.C. August 2, 2021

David I. Goldman
U.S. Administrative Law Judge